

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision: 02.12.2017

CRA-S-921-SB-2006

Dara Singh appellants

versus

State of Punjab Respondent

CRA-S-922-SB-2006

Boota Singh appellants

versus

State of Punjab Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Aman Dhir, Advocate
for the appellants.

Mr. A.S.Gill, Sr. DAG, Punjab.

Arvind Singh Sangwan, J.(Oral)

This order will dispose of the above said two criminal appeals as challenge is to the common judgment of conviction and order of sentence dated 31.01.2006 vide which the appellantss Dara Singh and Boota Singh was held guilty under Sections 15 of NDPS Act, 1985 for keeping 90 kgs of poppy husk in their possession and accused Dara Singh was further convicted under Section 18 of the Act for keeping 200 grams of Opium in his possession.

Before noticing the facts, it is observed that these appeals pertain to the year 2006 and are being persuaded by the legal aid counsel appointed by the High Court Legal Services Authority. Both the appellantss

have undergone more than 04 years of actual sentence awarded to them.

Brief facts of the case are that on 16.09.2004 a police party headed by ASI Kewal Singh, in their official vehicle was present at bus stand of village Channu where PW- Avtar Singh s/o Gurdial Singh met the police party and he was associated with them. The police party proceeded to village Beedowali, Badal and when they reached at the crossing of Berianwala, Village Maan. One Esteem Car was coming from the side of village Badal. On seeing the police party, the occupants of the car stopped and tried to run away. They were apprehended on suspicion by ASI Kewal Singh, Investigating Officer with the help of other police officials. The driver of the car disclosed his name as Boota Singh while other person's name was Dara Singh. ASI Kewal Singh told the appellantss that he suspected something in their car and search of their car was to be conducted and they have a right of search either in the presence of a Magistrate or a Gazetted Officer. On this, ASI prepared dissent memos of both the accused persons Ex. P-2 and P-3, which were signed by the accused and attested by HC Kulwant Singh and Avtar Singh as an independent witness. Thereafter, ASI Kewal Singh, IO sent QST to police station Lambi for sending some Gazetted Officer and a photographer at the spot. After some time, the photographer Constable Gurmail Singh reached at the spot and DSP Hargobind Singh also reached at the spot. After the DSP disclosed his identity to both the accused persons and gave them option for search from him or other Gazetted Officer or Magistrate, both the persons consented for search in his presence. ASI Kewal Singh prepared consent memos Ex.P-4 and P-5, which were signed by both the accused persons and attested by DSP Hargobind Singh. ASI Kewal Singh, on personal search of accused

Dara Singh found opium from the right side pocket of his shirt out of which 10 grams was separated as sample and put into a small plastic box and converted into parcel. On weighing the remaining opium it came to 190 grams, which was also put in a separate plastic box and converted into parcel. On the personal search of Boota Singh, Rs.130/- was recovered and took into possession vide memo Ex.P-C, which was signed by the accused and attested by the PWs.

Thereafter, ASI Kewal Singh conducted the search of car and from it three gunny bags containing poppy husk were recovered. Out of each gunny bag, 250 grams of poppy husk was separated as sample and converted into parcels. On weighing the gunny bag containing remaining poppy husk, it came to 29 kgs and 750 grams and same were also converted into parcels. ASI Kewal Singh sealed both the parcels relating to opium with his seal with impression 'KS' and DSP Hargobind Singh also put his seal on parcels with impression 'HGS'. Sample seal chit Ex.P-7 was separately prepared and both the sealed parcels were taken into possession vide recovery memo Ex.P-8 attested by DSP Hargobind Singh, HC Kulwant Singh and PW Avtar Singh. Thereafter, ASI Kewal Singh sealed all the three sample parcels and gunny bags of poppy husk his seal impression 'KS' and further sealed by DSP Hargobind Singh with his seal impression 'HGS'. Sample seal chit Ex.P-9 was separately prepared and was handed over to PW- Avtar Singh by ASI Kewal Singh, IO.

The case property including the car was taken into possession vide recovery memo Ex.P-10 attested by DSP and aforesaid two PWs. Thereafter, a ruqa Ex.P-12 was sent to the police station on the basis of which formal FIR Ex.P-13 was recorded. The site plan was prepared by

ASI Kewal Singh as Ex.P-14. The statement of witnesses under Section 161 Cr.P.C. 1973 were recorded. Constable Gurmail Singh prepared a video movie of the proceedings. On returning to the police station, ASI Kewal Singh produced the accused and entire case property before Inspector Joginder Singh, who further sealed it with his seal impression 'JS' and also affixed his seal on sample seal chits Ex.P-7 and P-9. He took the entire case property in his possession vide memo Ex.P-15 attested by ASI Kewal Singh.

On the next day, Inspector Joginder Singh produced the accused persons and case property in the court of SDJM, Malout with request Ex.P-19 on which SDJM passed the order Ex.P-20. He also prepared the inventory report Ex.P-21. SDJM after breaking open the seals of the bulk parcels took representative samples, which were sealed by him with his seal impression 'FSD-MTL'. The bulk parcel were also sealed by him. Thereafter Inspector Joginder Singh returned to the police station and deposited the case property with MHC Pritpal Singh with intact seals. He also sent a report to the DSP. After completion of investigation and on receiving the report of Chemical Examiner P-22 and P-23, challan against the accused persons was present in Court.

Both the accused were charge-sheeted under Sections 15 and 18 of NDPS Act to which they pleaded not guilty and claimed trial.

In support of its case, the prosecution examined PW-1 HC Pritpal Singh, who submitted his affidavit Ex.PO1. Similarly, PW-7 C.Sukhwinder Singh also submitted his affidavit Ex.P-24. They were formal witnesses.

PW-2 – ASI Kewal Singh in his statement narrated the entire prosecution story, the investigation conducted by him at the spot, the calling

of the DSP Hargobind Singh and Constable Gurmail Singh, joining of independent witness Avtar Singh and thereafter, completing the investigation at the spot and sealing the sample parcels, preparation of recovery memo, site plan etc. and proved all documents on record.

PW-3 HC Kulwant Singh, who was a part of the police party, also deposed on the same line.

PW-5 DSP Hargobind Singh stated that on receiving a message from police station Lambi on 16.09.2004, he reached at the spot and after disclosing his identity he asked the accused persons whether they wanted to be searched before a Magistrate or a Gazetted Officer. The accused deposed faith in him and thereafter ASI Kewal Singh prepared memo Ex.P-4 and P-5, which were signed by the accused persons and recovery of 200 grams of opium from the possession of the accused Dara Singh and recovery of three gunny bags of poppy husk each containing 30 kgs from the car was made. The recovered contraband was sealed as detailed above by the Investigating Officer as directed by him and also deposed about the receipt of report Ex.P-17 from the SHO on the next day vide endorsement Ex.P-18.

PW-6 SHO Joginder Singh stated that the case property was produced before him by ASI Kewal Singh. It was sealed by him with seal impression 'JS' and was taken into possession vide memo Ex.P-15 attested by ASI Kewal Singh. He produced the accused persons and case property in the Court of SDJM, Malout on the next day with request Ex.P-19 on which SDJM passed the order Ex.P-20. The inventory report Ex.P-21 was prepared and the photographs of the case property were also taken. The representative samples were drawn by SDJM and thereafter SDJM sealed the case property with his seal impression 'PSD-MTL'. On return in police

station, the case property was deposited with MHC Pritpal Singh with seals intact and he submitted the report Ex.P-17 to the DSP.

PW-4 C.Gurmail Singh stated about reaching at the spot on receiving the wireless message and prepared a video movie at the spot and this witness also stated that he was a witness to the recovery memo Ex.P-16.

PW-8 Kulwinder Singh another photographer stated that on 16.09.2004 he had gone to the Court premises and prepared the photographs Ex.P-25 and P-26, which were handed over to the police along with negatives Ex.P-27 and P-28.

Thereafter the statement of accused persons under Section 313 Cr.PC were recorded and the incriminating evidence was put to them. The accused persons denied the same and pleaded their false implication and further stated that they will lead defence evidence.

In defence the accused produced DW-1 MHC Jagjit Singh from police station Lambi, who had produced the FIR register and submitted that Ex.D-1 to D-10 are the correct photostate copies of the FIRs. This witness further stated that Avtar Singh s/o Gurdial Singh resident of Sehna Kehra is a prosecution witness in all these FIRs, which relates to police station Lambi.

DW-2 Sukhmander Singh, an independent witness, was also examined in defence, who stated that 16 months ago, he was present at the bus stand and the accused came there in a maruti car. After 5 minutes, police party came there and demanded car from them to which they denied. On this an altercation took place. SHO gave a slap to accused Dara Singh, who gave abuses to SHO. On this the police party took the accused along with car to the police station. After few days of the incident, he came to

know that accused have been falsely implicated in this case.

On the appreciation of evidence, the trial Court vide impugned judgment of conviction and order of sentence dated 13.01.2006 held both the accused guilty of offence punishable under Section 15 of NDPS Act, 1985 for possessing 90 kgs of poppy husk. Accused Dara Singh was also convicted under Section 18 of the said Act for keeping 200 grams of opium. Both the accused persons were sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.One lakh each or in default of payment of fine to further undergo rigorous imprisonment for one year each.

Learned counsel for the appellants has assailed the findings recorded by the trial Court and submitted that from the statements of PW-2 ASI Kewal Singh as well as PW-5 DSP Hargobind Singh, it is not proved that who is the owner of the car. He further submits that in the entire investigation conducted by the police, no evidence has been collected regarding the registered ownership of the car from which the recovery was effected and thus, the important link evidence has not come on record. It is further submitted that the identity of the driver of the car was also not properly proved. Learned counsel has submitted that though it has come in evidence from the deposition of PW-2 ASI Kewal Singh that Dara Singh was driving the car and in the impugned judgment a wrong finding has been rendered that Boota Singh was driving the car. Learned counsel for the appellants has also submitted that the independent witness Avtar Singh as per the statements of PW-2 ASI Kewal Singh and PW-5 DSP Hargobind Singh, was not produced before the trial Court. Learned counsel for the appellants has further submitted that no explanation has been given by the

prosecution as to why Avtar Singh was not examined and therefore, another important link evidence is missing in this case. Learned counsel for the appellants has further submitted that this witness Avtar Singh is a stock witness and it has come in evidence of DW-1 MHC Jagjit Singh of Police Station Lambi, who has produced number of FIRs Ex.D-1 to D-10 and deposed that Avtar Singh is a prosecution witness in all the 10 FIRs. Learned counsel for the appellants has submitted that the trial Court has held that some of the FIRs, in which Avtar Singh is cited as prosecution witness, were registered after the registration of the present FIR and therefore, he cannot be held as a stock witness is wrong in view of the fact that in all the 10 FIRs Ex.D-1 to D-10 registered under NDPS Act Avtar Singh was cited as an independent witness, which show that just to fill up the formalities, the police is citing him as an independent witness. It is further submitted that the investigation conducted by the police was not proper and the statement recorded under Section 313 Cr.PC by the trial Court is also defective as no specific question has been put to both the appellants that they were found in conscious possession of recovered contraband. He has referred to the statement of both the accused Dara Singh and Boota Singh recorded under Section 313 Cr.PC and a perusal of the same shows that in question No.1 it was put that the police party was present at the spot and on seeing the police party, the car in which the appellants were travelling, was stopped and they came out and tried to run away. On suspicion, they were apprehended at the spot. In this question, it was also stated that one of the accused told his name as Dara Singh and other as Boota Singh. No specific question was put as to who was the driver or owner of the vehicle. With regard to question No.4, learned counsel for

the appellants has submitted that it was never put to the accused persons that they were in conscious possession of the contraband. Question No.4 states that “when ASI Kewal Singh conducted the search of car, three gunny bags containing poppy husk were recovered” and thereafter, the procedure for taking the same in possession was put to the accused persons. Learned counsel for the appellants has referred to 12 other questions put to the accused persons in their statement recorded under Section 313 Cr.PC where it is nowhere asked that the accused were found in conscious possession of the poppy husk or the opium, which was recovered from one of the accused Dara Singh. Learned counsel for the appellants in support of his arguments that statement under Section 313 Cr.PC was not recorded in accordance with law and no specific question was put to the appellants that they were in conscious possession of the contraband, relied upon the judgment of Hon'ble Supreme Court in ***Avtar Singh vs. State of Punjab, 2002(4) RCR (Crl.) 180*** wherein it has been held as under:

*“Possession is the core ingredient to be established before the accused in the instant case are subjected to the punishment under Section 15. If the accused are found to be in possession of poppy straw which is a narcotic drug within the meaning of Clause (xiv) of S. 2, it is for them to account for such possession satisfactorily; if not, the presumption under Section 54 comes into play. We need not go into the aspect whether the possession must be conscious possession. Perhaps taking clue from the decision of this Court in ***Inder Sain Vs. State of Punjab (1973 (2) SCC 372)*** arising under the Opium Act, the learned trial Judge charged the accused of having conscious possession of poppy husk. Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution satisfactorily*

proved the fact that the accused were in possession of poppy husk. Accepting the evidence of PW 4 the Head constable, it is seen that appellants No.3 (Accused No.4) was driving the vehicle loaded with bags of poppy husk. appellants 1 and 2 (Accused Nos. 1 and 2) were sitting on the bags placed in the truck. As soon as the vehicle was stopped by ASI (PW 2), one person sitting in the cabin by the side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. The word 'possession' no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants one of whom was driving the vehicle and other two sitting on the bags, were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance, if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction under Section 15 may not be warranted. At best, they may be abettors, but, there is no such charge here. True, their silence and failure to explain the circumstances in which they were traveling in the vehicle at the

odd hours, is one strong circumstance that can be put against them. A case of drawing presumption under Section 114 of the Evidence Act could perhaps be made out then to prove the possession of the accused, but, the fact remains that in the course of examination under Section 313 Cr.P.C, not even a question was asked that they were the persons in possession of poppy husk placed in the vehicle. The only question put to them was that as per the prosecution evidence, they were sitting on the bags of poppy husk. Strangely enough, even the driver was questioned on the same lines. The object of examination under S.313, it is well known, is to afford an opportunity to the accused to explain the circumstances appearing in the evidence against him. It is unfortunate that no question was asked about the possession of goods. Having regard to the charge of which appellants were accused, the failure to elicit their answer on such a crucial aspect as possession, is quite significant. In this state of things, it is not proper to raise a presumption under Section 114 of Evidence Act nor is it safe to conclude that the prosecution established beyond reasonable doubt that the appellants were in possession of poppy husk which was being carried by the vehicle. The High Court resorted to the presumption under Section 35 which relates to culpable state of mind, without considering the aspect of possession. The trial court invoked the presumption under S.54 of the Act without addressing itself to the question of possession. The approach of both the courts is erroneous in law. Both the courts rested their conclusion on the fact that the accused failed to give satisfactory explanation for travelling in the vehicle containing poppy husk at an odd hour. But, the other relevant aspects pointed out above were neither adverted to nor taken into account by the trial court and the High Court. Non-application of mind to the material factors has thus vitiated the judgment under appeal.”

This judgment has been relied upon by this Court in **2008(1)**

RCR (Crl.) 1050 titled as ***Dalbir Singh @ Beera vs. The State of Punjab*** and ***2007(4) RCR (Crl.) 898 Avtar Singh vs. State of Punjab***.

It is, thus, submitted that when no specific question was put to the appellants that they were in conscious possession of the contraband, the conviction is liable to be set aside. Learned counsel for the appellants further submits that a Full Bench of this Court in ***2006 (2) RCR (Crl.) 477*** in case titled as ***Kashmir Singh vs. State of Punjab*** has also dealt with similar point. The operative paragraphs of this judgment are reproduced as under:

“12. When the Trial Judge records the statement of an accused person under Section 313 Cr.PC with regard to the circumstances which have appeared in evidence against him, the learned Judge gives the accused an opportunity to explain those circumstances. The accused generally denies the prosecution case against him but it is an opportune moment for him to plead any type of defence that he may like to take. Therefore, by extending the provisions of Section 313 Cr.PC and on first principles of fair trials as well, there is need to give every accused person an opportunity to explain the case against him. Wheresoever the presumption under Sections 35 & 54 is to be raised, it would be advisable for the Trial Court to frame a question under Section 313 Cr.PC in order to give the accused a fair opportunity to rebut the presumption. Indeed Sections 35 and 54 do entitle the accused to rebut the presumptions but it is strange that trial Courts do not give the accused this opportunity. Unless the accused have been given the opportunity to prove that he had no such mental state as presumed under Section 35 or that he had satisfactorily accounted for the possession which was being presumed against him under Section 54, the respective presumptions cannot be raised against the accused.

17. *The Division Bench of this Court in **Raj Kumar vs. State of Punjab, 2005(1) RCR (CrL.) 70** recorded the following reasons for acquitting the accused:*

“It would, therefore, be apparent that presumption of culpable mental state and presumption of possession can be raised against accused persons but where these presumptions are raised the accused has a right to rebut the presumptions by pleading in his defence that he has no such mental state with respect to the act charged as an offence or that he has been able to satisfactorily account for the possession. Accused can give his counter explanation. It is necessary for the trial Court to frame a specific question regarding the presumption which is sought to be raised either under Section 35 or Section 54 when examining the accused under Section 313 Cr.PC and seeking his explanation. Unless this is done the presumption under Sections 35 and 54 cannot be used against the accused. Consequently, in the present case, the presumptions were not available to the prosecution. Furthermore, the prosecution had failed to prove that either Raj Kumar (driver) or Hawa Singh (passenger) were in possession of the opium recovered from the bag which was lying in between them on the seat of the jeep.”

19. *For the above reasons, we would answer the question raised by stating that no presumption under Sections 35 and 54 should be used against the accused unless he has been given an opportunity to rebut the presumptions in his statement under Section 313 Cr.PC by being called upon to explain the circumstances which give rise to the presumptions. Thereafter the accused should be given an opportunity to lead evidence in defence in support of his stand. However, there is no real or*

apparent conflict regarding the correct meaning of “possession” which needs to be resolved.”

The counsel further submitted that the Hon'ble Supreme Court has also held in **2009(2) RCR (Crl.) 514** titled as ***Inspector of Customs, Akhnoor, J&K vs. Yash Pal and another*** that the object of examination of an accused under Section 313 Cr.PC is to enable the accused person to explain any circumstance appearing in the evidence against him. The operative part of the said judgment is reproduced as under:

*20. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is “for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him”. In **Jai Dev v. State of Punjab (AIR1963 SC 612)** Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:*

“The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.”

21. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

22. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to

comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The word “may” in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used 13 against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.”

Learned counsel for the appellants has further argued that the FIR was registered after preparation of documents Ex.P-1 to P-11 but the FIR number is mentioned in these papers and submits that it has come in the statement of PW-2 ASI Kewal Singh:

“Firstly sample parcel and bulk parcel of opium were sealed by me with my seal bearing impressions 'KS'. DSP Hargobind Singh also sealed the said parcel with his seal bearing impressions 'HGS'. Sample seal chit was separately prepared. DSP also affixed his seal on sample seal chit which is Ex.P-7. The case property relating to recovered opium was taken into possession by me vide recovery memo Ex.P-8 attested by DSP, HC Kulwant Singh and PW- Avtar Singh. Then I sealed all the three sample parcels and gunny bags containing remaining poppy husk with my seal bearing impressions 'KS' and further by the DSP with his seal bearing impressions 'HGS'. Sample seal chit Ex.P-9 was separately prepared and seal after use was handed over by me to PW Avtar Singh. DSP also affixed his seal on sample seal chit. The entire case property including the car was taken into possession by me vide memo Ex.P-10

attested by DSP and aforesaid PWs. I arrested both the accused and prepared memo of arrest Ex.P-11. Ruqa Ex. P-12 was sent to the police station and on the basis of which formal FIR Ex.P-13 was recorded.”

Thus, learned counsel for the appellants has submitted that ruqa Ex.P-12 was sent to the Police Station, when recovery was already effected by PW-2 ASI Kewal Singh and attested by the independent witness PW-Avtar Singh and HC-Kulwant Singh vide memo Exs.P-6 to P-11.

Learned counsel for the appellants has drawn the attention towards these documents, which are on page 105 onwards of the Lower Court record, which show that in the personal search memo of Boota Singh, FIR No.182 dated 16.09.2004 was mentioned. Similarly, it has come in the sample seal chit Ex.P-5 also, which is pasted on Form M 29 (at page 107). It bears the date 20.09.2004 under the signatures of PW-2 ASI Kewal Singh and SHO Joginder Singh . In the recovery memo Ex.P-8, there is mention of FIR No.182 dated 16.09.2004 and on the second sample seal chit Ex.P-9 also, FIR number along with date was mentioned, which is pasted on Form M 29 (at page 111) on which again under the signatures of ASI Kewal Singh and SHO Joginder Singh the date is mentioned as 20.09.2004. Similarly perusal of document Ex.P-10, recovery memo Ex.P-11 and memo of arrest Ex.P-12 shows that the FIR number is already mentioned in them.

Learned counsel for the appellants has argued that from all these documents it is apparent that FIR number was mentioned, even prior to the stage when intimation was sent vide Ex.P-12 for registration of the FIR as per PW-2 ASI Kewal Singh. In support of his argument, learned counsel for the appellants has relied upon **2009(3) RCR (Crl.) 649 Ajay**

there is no explanation how in the documents, which were allegedly prepared at the spot and thereafter an intimation was sent to the police station for registration of an FIR, its number is mentioned. It is, thus, submitted that all these documents were prepared later on and therefore, the integrity of the prosecution version is doubtful. Learned counsel for the appellants has further relied upon the statement of DSP Hargobind Singh, who has admitted in the cross-examination that no CFL form was prepared in his presence at spot and thus, it is submitted that the preparation of documents Ex.P-6 to P-11 at the spot is highly doubtful.

Learned counsel for the appellants has further argued that defence version taken by the appellants that they have been falsely implicated in this case, has not been properly dealt by trial Court. It is lastly submitted that the appellants have undergone actual sentence of more than four years and are not previous convicts. The appellants have not misused the concession of bail granted to them as they were not involved in any other case subsequently.

After hearing learned counsel for the appellants and perusing the record of the file, both the appeals deserve to be allowed on the basis of following findings:

Firstly, it has come in the statement of PW-2 ASI Kewal Singh that the documents Ex.P-6 to P-11 were prepared at the spot. These documents are sample seal chit of opium Ex.P-7, recovery memo of opium Ex.P-8, sample seal chit Ex.P-9 regarding the poppy husk and recovery memo of the case property including the car Ex.P-10 and arrest memo Ex.P-11. A perusal of all these documents shows that these were prepared at the spot and thereafter the ASI has sent an intimation (ruqa Ex.P-12) to

the police station for registration of the FIR and on the basis of that, FIR was registered. However, all these documents bearing FIR No.182 dated 16.09.2004, and it is not explained by the prosecution, how FIR was mentioned in these documents, which were prepared much before the registration of FIR. Therefore, it is highly doubtful that these documents were prepared at the spot in view of the judgment Ajay Malik(supra).

Secondly, PW-5 DSP Hargobind Singh in his cross-examination admitted that Form M 29 i.e. CFL form was not prepared in his presence at spot. This fact finds support from the perusal of two documents i.e. Ex.P-5 and Ex.P-9 as the date of both CFL Forms is 20.09.2004 whereas the alleged recovery was made on 16.09.2004 and there is no explanation why these forms were not filled up at the spot.

Thirdly, it has not come in the evidence either by PW-2 ASI Kewal Singh or PW-3 HC Kulwant Singh that out of two appellants, who was driving the car though they had stated that two persons were coming in an esteem car and it was stopped on suspicion. Even during the investigation, no efforts were made to find out who was the registered owner of the car and no document of registration was exhibited on the record.

Fourthly, a perusal of the statement of the appellants recorded under Section 313 Cr.Pc shows that no specific question was put to them that either they were owners of the car or they were in the conscious possession of the contraband recovered from the car. It has come in the statement of PW-5 DSP Hargobind Singh that the contraband was recovered from the dicky of the car. No specific question was put to the accused persons while recording their statements under Section 313 Cr.PC that the

recovery was made from the dicky of the car. In view of the judgments of Hon'ble Supreme Court in *Avtar Singh's case(supra)* and *Inspector of Customs, Akhnoorm J&K(supra)*, the important right given to the appellants to rebut the evidence, which has come against them, has been violated.

Fifthly, though it is well settled principle of law that non-examination of an independent witness is not fatal to the prosecution case under NDPS Act, however, in this particular case, when the prosecution has involved an independent witness Avtar Singh, whose signatures were taken on the various documents, it was incumbent on the prosecution to examine this witness especially when these documents are not proved to be prepared at spot.

Sixthly, it has come in the defence evidence that the said witness Avtar Singh is cited as prosecution witness in 10 FIRs i.e. Ex.D-1 to D-10 registered under NDPS Act and therefore, he is a stock witness, who has been cited by the police in each and every case in same police station and has not been examined by the prosecution. The trial Court has discarded the defence raised by the appellants that PW-Avtar Singh is a stock witness, on the ground that majority of the FIRs were registered subsequently to the present FIR but the trial Court has failed to appreciate the statement of PW-2 ASI Kewal Singh, who has admitted in his cross-examination that PW- Avtar Singh is a prosecution witness in two/four other cases. It was for this reason that this witness was given up by the Public Prosecutor by stating that he has been won over, so that during trial it may not come on record that in 10 FIRs Ex.D-1 to D-10 he was a prosecution witness. Moreover, in the documents Ex.P-6 to P-11, which are allegedly signed by him, were not proved to be prepared at the spot or

subsequently and therefore, the non-examination of this witness has obviously effected the right of defence of the appellants.

Lastly, though the prosecution has set up a case that PW-4 – C. Gurmail Singh has done the videography at the spot, however, a perusal of his statement shows that the said video CD was taken by the police vide memo Ex.P-16 and the parcel is Ex.MO9. The said video CD was never exhibited on the trial Court record.

In view of the discussion made above, the present appeal is allowed. The impugned judgment of conviction and order of sentence passed by the trial Court is set aside.

02.12.2017
sonia

(Arvind Singh Sangwan)
Judge

1. Whether speaking/non-speaking?	Yes
2. Whether reportable?	Yes